MOTION FILED
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No. 88-533

In the
Supreme Court of the United States

OCTOBER TERM, 1988

THERESE U. DONNELLY, *et al*, PETITIONER,

v.

EKLUTNA, INC., *et al*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Motion for Leave to File Brief as *Amicus Curiae* and Brief of Fifty-Nine Alaska 14(c) Claimants as *Amicus Curiae* in Support of Petition

---

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26 pp

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v.

EKLUTNA, INC., et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
ON BEHALF OF 59 ANCSA 14(c) CLAIMANTS
IN SUPPORT OF PETITIONERS

Pursuant to Rules 36 and 42 of the Rules of the United States Supreme Court, ANCSA 14(c) Claimants[1/] respectfully move for leave to file the attached brief Amicus Curiae; in support of the Petitions filed by Donnelly and Lee.

1/ Alan Abramson, Michelle Abramson, L. Ann Barker, William H. Barker, Bernard P. Burkholder, Jody M. Burkholder, Marianne Burkholder, Nina Lee Burkholder, Becky A. Carlson, Stanley D. Carlson, D. Chester Cantley, Esther E. Cantley, Donna J.

(Footnote continued on following page)

The Solicitor General has consented to such participation as Amicus Curiae. A copy of his consent is attached as Exhibit "A". Eklutna would not give its consent. No explanation was given. Consequently, this motion is submitted and supported by the following points:

1. Said fifty-nine individuals and companies have 14(c) claims under the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601, et seq ("ANCSA). The Ninth

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(footnote continued from preceding page)

Darrough, Robert D. Darrough, David W. Dieters, Rita R. Dieters, Benton A. Evans, Chuck Evans, Fields & Sons, Inc., Dewitt Fields, Duncan S. Fields, Wallace W. Fields, Wanda A. Fields, Weston W. Fields, Joy L. Guthrie, Richard L. Guthrie, JoAnn M. Graves, Stanley R. Graves, Clistia Jones, Elisabeth Kouremetis, Leo Kouremetis, Patrick J. Killion, Sandra C. Killion, Patricia A. Kust, Peter J. Kust, Marla Krigbaum, Morris C. Krigbaum, John E. Libby, Phyllis L. Libby, Frances Bruce Luque, Tana Cochran-Luque, Kathryn Madson, Richard R. Madson, Blanche L. Murphy, Jane E. Nuttall, John P. Nuttall, Mary Jo Nuttall, Michael J. Nuttall, Celestine O. Omlid, Darlene L. Omlid, Oluf K. Omlid, Sid M. Omlid, James R. Pryor, Donald P. Sagmoen, Helen E. Sagmoen, Claude D. Slater, Togiak Fisheries, Inc., Clarence Wren, and V. May Wren.

Circuit's decision in the above-referenced matter, exposes each of them, and all others similarly situated, to eviction from their homes or business property which they and their predecessors-in-interest have occupied for over twenty years. Unlike Donnelly or Lee, the Amicus Curiae are not failed homesteaders; none were the subject of eviction efforts by the U.S. Government. Most are operators of commercial fishing sites; all have spent considerable money improving their remote property, much of it in reliance on the language of ANCSA 14(c).

2. Amicus Curiae participation will help provide insight as to the significance of the ANCSA issues not only to all ANCSA 14(c) claimants; but to all Americans on whose behalf Congress made the historic Alaska Native Land Settlement.

3. The joint Donnelly and Lee decision is a case of first impression on ANCSA 14(c) issues. Until overruled or distinguished, it will control the outcome

of untold thousands of pending and potential 14(c) claims. If this Court does not correct the Ninth Circuit's decision at this time and set forth policy guidelines for ANCSA 14(c) claims, it will be too late to do so in future cases. The result will be uncorrectable damage and injustice since few, if any, of such claimants can afford the cost of taking their ANCSA 14(c) claims all the way through the federal judicial system in the face of the Donnelly/Lee decision on the mere hope this Court will grant review in their own cases.

4. The interests of the fifty-nine 14(c) Claimants differ from that of Petitioners, in that Donnelly/Lee were principally interested in obtaining broader relief in the courts below under the Homestead Act in order to receive title to more acreage than would be the case under ANSCA 14(c). The order and emphasis of the issues in both the briefs and decisions below reflect such different focus. The

interest of the fifty-nine Claimants is limited solely to the ANSCA 14(c) issue, an issue which has thus far been treated as an afterthought, despite its crucial importance and far reaching ramifications.

5. Counsel for the Amicus Curiae was Alaska's Attorney General when the Alaska Native Claims Settlement Act ("ANCSA") legislation was originally working its way through Congress. He is familiar with its legislative history. To date the courts below have rendered their decisions without the benefit of highly relevant legislative history which supports a conclusion contrary to that reached by the Ninth Circuit.

Respectfully submitted,

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ANCHORAGE, ALASKA

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

October 17, 1988

G. Kent Edwards
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717 K Street
Anchorage, Alaska 99501-3397

Re: Donnelly v. Eklutna, et al., No. 88-533

Lee v. Eklutna, et al., No. 88-549

Dear Mr. Edwards:

This is in response to your letter of October 14, 1988.

On behalf of the federal parties I hereby consent to the filing of an amicus curiae brief on behalf of the forty two Alaska Native Claims Settlement Act claimants in the above cases.

Sincerely,

Charles Fried

Charles Fried
Solicitor General

EXHIBIT "A"

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QUESTIONS PRESENTED

1. In passing the Alaska Native Claims Settlement Act ("ANCSA") did Congress intend that Native and non-native squatters be dispossessed of their places of residence and business even though they, or their predecessors-in-interest, occupied the lands before December 1971 in the manner specified for conveyance eligibility under Section 14(c) of that Act?

2. Did Congress intend that the United States of America be treated as an indispensable party in ANSCA 14(c) claim cases?

3. Did Congress intend that ANCSA 14(c) claims be governed by the statute of limitations contained in the Quiet Title Act, 28 U.S.C. 2409a(g), rather than that contained in 43 U.S.C. 1632(b)?

INTEREST OF THE 59 ALASKAN AMICUS CURIAE

The interest of the fifty-nine Alaska Alaska Native Claims Settlement Act 14(c) claimants[1/] (hereinafter "ANCSA claimants") requesting permission to appear as Amicus Curiae, is set forth in their Motion For Permission To Appear, which statements are incorporated herein by reference.

1/ Alan Abramson, Michelle Abramson, L. Ann Barker, William H. Barker, Bernard P. Burkholder, Jody M. Burkholder, Marianne Burkholder, Nina Lee Burkholder, Becky A. Carlson, Stanley D. Carlson, D. Chester Cantley, Esther E. Cantley, Donna J. Darrough, Robert D. Darrough, David W. Dieters, Rita R. Dieters, Benton A. Evans, Chuck Evans, Fields & Sons, Inc., Dewitt Fields, Duncan S. Fields, Wallace W. Fields, Wanda A. Fields, Weston W. Fields, Joy L. Guthrie, Richard L. Guthrie, JoAnn M. Graves, Stanley R. Graves, Clistia Jones, Elisabeth Kouremetis, Leo Kouremetis, Patrick J. Killion, Sandra C. Killion, Patricia A. Kust, Peter J. Kust, Marla Krigbaum, Morris C. Krigbaum, John E. Libby, Phyllis L. Libby, Frances Bruce Luque, Tana Cochran-Luque, Kathryn Madson, Richard R. Madson, Blanche L. Murphy, Jane E. Nuttall, John P. Nuttall, Mary Jo Nuttall, Michael J. Nuttall, Celestine O. Omlid, Darlene L. Omlid, Oluf K. Omlid, Sid M. Omlid, James R. Pryor, Donald P. Sagmoen, Helen E. Sagmoen, Claude D. Slater, Togiak Fisheries, Inc., Clarence Wren, and V. May Wren.

REASONS FOR GRANTING CERTIORARI AND SUMMARILY REVERSING.

A THE NINTH CIRCUIT'S 14(c) HOLDINGS WERE MADE WITHOUT BENEFIT OF HIGHLY RELEVANT LEGISLATIVE HISTORY WHICH SUPPORTS A CONTRARY RESULT.

A review of the briefs below and resulting court decision indicate that the Ninth Circuit was unaware of the relevant legislative history of ANCSA 14(c). [43 U.S.C. 1613(c)] That history can be found in Hearing before the Committee on Interior and Insular Affairs, U.S. Senate 91st, Cong., 1st Sess., on S. 1830 [hereinafter Senate Bill 1830]. Senate Bill 1830 was the legislative stone from which the ANCSA settlement was carved by Congress.

The legislative history of Senate Bill 1830 confirms that it was deemed essential to the structure of the settlement that nobody be dispossessed from their home, businesses, or subsistence camp sites located upon the ANCSA settlement lands.

Section 14(c) ANCSA has its origin in Section 10(a) of Senate Bill 1830. That section provides in pertinent part:

> Upon completion of surveys required by section 9 of this Act, the secretary is authorized to issue a patent to the surface of any public lands within the areas withdrawn under the Act to the individual or organization occupying such land at the time of the survey. (emphasis added) Hearing before The Committee on Interior and Insular Affairs, U.S. Senate, 91st Congress, 1st Sess., on S. 1830, p. 29.

At the Senate Interior hearing on Senate Bill 1830, Joseph H. Fitzgerald, Chairman of the task force charged with formulating a legislative resolution of the Alaska native land claims, set forth the reason for making land transfers to "occupants" rather than to a more narrowly defined group:

> The elements of any claims settlement must (1) provide to the village people the land they actually use for homes, businesses, hunting, and fishing camps, and the like; ...
>
> The elements of the proposed settlement are these:

> (1) Land used by the individuals in the villages is transferred directly to them with a minimum of red tape; the villages themselves each become eligible to select up to 36 square miles of surrounding land if they incorporate as organized communities under State law. This provision is the one most immediately important to the village people, who are now in most cases only "squatters" on Federal land. Between 3 and 6 million acres would ultimately be transferred in this way. (emphasis added) Id., p. 121,

The occupancy provision of Senate Bill 1830 was in fact a fulfillment of Section 8 of the 1884 Organic Act, 23 Stat. 24, which provides:

> That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.... (emphasis added)

The concept of the ANCSA settlement was to preserve the way of rural Alaska village life wherein Alaska natives and non-natives live together, rather than in segregated fashion of the traditional "Lower 48" Indian Reservations. At stated by Mr. Fitzgerald at the Senate Interior Hearings:

> We also believe that one of the great problems in Alaska is that it is on the very threshold of its development, and it would be unwise in Alaska to create today nearly 200 reservations, one for each of the small villages in the State. Alaska today is an open society, its communities are open, while we talk about open villages, these are not closed villages. White people, other people live there too. And it would be very desirable in the long-range political future of Alaska to keep it this way. And it is this kind of concept we have tried to bring to our proposals. Id., p. 126.

It was this "open society" philosophy which was the basis for allowing "squatters" to receive reconveyances.

Given the language of the 1884 Organic Act and Senate Bill 1830, the source of the "occupancy" provision in ANCSA is unmistakable.

The conclusion that Congress did not intend to exclude "squatters" from ANCSA 14(c) reconveyance rights is further supported by the fact that in 1971, when Congress passed ANCSA, there was no statute penalizing erection of cabins on public lands. Even at the present time no penalty

exists under either the Federal Public Land Policy and Management Act, 43 U.S.C. 1701, et seq., or 43 C.F.R. 9230 for the unauthorized erection of cabins. Consequently, "squatter" occupancy arguably is not so egregious as to warrant a conclusion that Congress was unlikely to have granted them title rights.

B. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THAT OF THE ALASKA SUPREME COURT IN HAKALA v. ATXAM CORP.

The Ninth Circuit's holding below is contrary to the unanimous holding of the Alaska Supreme Court in the case of Hakala v. Atxam Corp., 753 P.2d 1144 (Alaska 1988). In Hakala, Atxam sued two hunting game guides, George Kitchen and S. Hakala, in Alaska State Court for trespass based on the construction of a cabin, and engaging in game guide activities on Atxam ANSCA lands. Rather than remove the case to federal court, Hakala and Kitchen defended the case in the Alaska state courts based on their ANCSA 14(c) claim rights, and prevailed.

The Alaska Supreme Court stated:

> We do not, however, believe that Congress intended under ANCSA to convey lands to native corporations to the exclusion of those who had previously utilized the lands in an established, legal and routine fashion. Otherwise, we can find no reason for Congress to have included the reconveyance clause in § 14(c)(1). Thus, we believe that in § 14(c)(1), Congress intended to protect the existing rights of those using lands which would later become subject to an interim conveyance under ANCSA. Accordingly, we adopt an interpretation of the phrase "a primary place of business" which effectuates Congress' intent to protect a wide array of existing legitimate businesses. Id., 1147.

It went on to note:

> In interpreting the phrase "a primary place of business," we are particularly mindful of the statutory context in which that phrase appears. Most of the lands subject to conveyance under ANCSA are remote lands, outside the confines of cities, towns and villages. In drafting Section 14(c)(1), Congress must have had in mind those particular lands, and the nature of the particular businesses that are ordinarily conducted on those lands. Much of that business is seasonal, and involves the use of structures that can hardly be considered permanent.... Id., 1148.

Consequently, the Alaska Supreme Court found that Kitchen had a 14(c) claim to that portion of Atxam's ANCSA lands where Kitchen

had erected a small garage type structure made of plastic and metal for his bear hunting operations in the area, even though (1) the structure had only been used during part of a two week period in May and two weeks in October each year, (2) the structure had only been used for 2 out of 20 hunts in 1971, (3) Kitchen usually guided elsewhere out of Teller, Kotzebue and in the Wrangell and Talkeetna mountains, and (4) no pre-1971 federal permit or other vested right was stated to have been held by Kitchen or Hakala.

Since ANCSA 14(c) will only arise either in federal courts within the Ninth Circuit or in the Alaska state courts, this Court should resolve the existing conflict.

C. THE NINTH CIRCUIT'S DECISION RENDERS ANCSA 14(c) MEANINGLESS.

By holding that the Section 14(c)(1) of ANCSA does not apply to technical trespassers on federal lands, the court has rendered

14(c)(1) meaningless. Under the Ninth Circuit's construction 14(c)(1) would be redundant to Sections 11(a), 14(g), and 22(b) of ANCSA. [43 U.S.C. § 1610(a), 1613(g), and 1621(b)]. The latter sections protect non-trespassers who had formal vested land rights granted by the United States before ANCSA's enactment.

D. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THAT OF THE DEPARTMENT OF INTERIOR IN APPEAL OF THEODORE J. ALMASY.

The Department of Interior's Alaska Native Claims Appeal Board ("ANCAB") held in Appeal of Theodore J. Almasy, 87 I.D. 81, 85 (February 27, 1980) that ANCSA 14(c)

> ... protects certain land uses based on occupancy alone, without requiring a claim of title or of a lesser interest derived from contract entry under the public land laws or other authorization.

It is well established that "... great deference should be given to the interpretation that the Secretary of the Interior

places on the statutes which he administers." Alaska Miners v. Andrus, 662 F.2d 577, 579 (9th Cir. 1981). Similar deference should be accorded the Almasy decision because ANCAB was chartered under the jurisdiction of the Secretary of Interior.

E. ANCSA 14(c) RIGHTS ARE NOT IMPAIRED BY WITHDRAWAL FOR PURPOSES OTHER THAN NATIONAL PARKS OR MILITARY DEFENSE.

The Ninth Circuit erred when it stated "... there was no indication of legislative intent to override the established principal that individuals could obtain no rights to withdrawn lands." [See, pps. 15(a) - 16(a) of Petitioners' Joint Appendix]

At the time of ANCSA's enactment most federal lands in Alaska were in a withdrawn status due to Secretary Udall's Public Land Law Order 4582 (the so-called "Alaska Land Freeze"). [See, also, 43 U.S.C. 1616(d)(2) (1971)] ANCSA also withdrew from appropriation or entry under the public land laws,

the entire area proposed for native land conveyances. 43 U.S.C. 1610 (1971) Consequently, the lands conveyed under ANCSA were all withdrawn lands. Congress clearly stated in 43 U.S.C. 1610 that the only public lands not subject to conveyance under ANCSA were the National Park System lands and military withdrawals.

Because Congress permitted the conveyance to ANCSA corporations of all withdrawn lands, with the above two exceptions, the conclusion that ANCSA prohibits the reconveyance of the same lands to occupants is illogical, particularly since the reconveyances are from ANCSA corporations not directly from the United States. Further support for this contention is found in the ANCSA definition of "Public Lands" under 43 U.S.C. § 1602(e) which provides:

> "Public lands" means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary,

> enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to January 17, 1969;...

F. THE UNITED STATES IS NOT AN INDISPENSABLE PARTY IN ANCSA 14(c) ACTIONS BETWEEN OCCUPANTS AND NATIVE CORPORATIONS.

The Ninth Circuit erroneously held that 14(c)(1) claims cannot be resolved in any action to which the United States is not a party apparently on the belief that the government must play some role in the adjudication process. A similar argument, i.e. that the Secretary of Interior must take an an active role in adjudicating validity of the rights to which ANCSA conveyance lands are subject, was rejected in the case of Alaska Miners v. Andrus, 662 F.2d at 580.

The U.S. is not required to decide 14(c) issues. ANCSA only requires that the

Secretary make a survey, nothing else. 43 U.S.C. 1612. The Secretary need not decide anything regarding the validity of ANCSA 14(c) claims. That dispute is between the Native corporations and ANCSA 14(c) claimants. [See attached BLM Notice so proclaiming, Exhibit "B"] Congress merely left such issues open for either agreement by the parties or, in the absence of such agreement, for decision by the court. Reconveyance to a specified group of occupants is a ministerial function, not a discretionary one. The types of occupany which qualify are clearly specified in the statute, "... a primary place of business, a primary place of residence, subsistence camp site or reindeer husbandry." 43 U.S.C. 1613(a)(1)

G. THE QUIET TITLE ACT STATUTE OF LIMITATIONS IS NOT APPLICABLE.

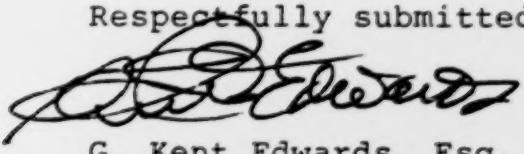
Under the Ninth Circuit's reasoning, all ANCSA 14(c) claims would have been time

barred by the twelve year statute of limitation contained in the Quiet Title Act, 28 U.S.C. 2409a(g). Interestingly, The Quiet Title Act was not even law when ANCSA was enacted. Moreover, Congress has clearly specified that ANCSA 14(c) claims are to be governed by 43 U.S.C. 1632(b) which provides for a statute of limitations of "... one year after the date of filing of the map of boundaries as provided for in regulations promulgated by the Secretary." Such map of boundaries have not been filed yet for most ANCSA settlement land areas. By starting with the premise that 43 U.S.C. 1632(b) controls, one is led to the conclusion that 28 U.S.C. 2409a(g) does not apply and, therefore, the U.S. Government was not considered by Congress to be an indispensable party.

CONCLUSION

The Petition For Writ Of Certiorari should be granted and the Ninth Circuit's decision summarily reversed. To do otherwise would be to subject most occupants of rural native village lands to the ejectment whims of the Native corporations in title; thereby defeating one of the principal land claim settlement goals of Congress - the preservation of an open village society as it existed in 1971.

Respectfully submitted,



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BLM

PUBLIC NOTICE TO VILLAGE RESIDENTS

Each village corporation listed below has now officially filed with the Bureau of Land Management (BLM) a map of the village boundaries. This map shows all *or part of* the parcels of land the village corporation has identified as qualifying for transfer of ownership, such as houses, businesses, etc., under Section 14(c) of the Alaska Native Claims Settlement Act (ANCSA). 43 USC 1613(c). This section of the Act requires the village corporation to identify and convey to any Native or non-Native occupant, title to the surface estate in the tract occupied in 1971 as a primary place of residence, primary place of business, subsistence campsite, headquarters for reindeer husbandry, or for certain other specified purposes.

If you have an interest in such land, you should contact the village corporation to review the map of boundaries to be sure the map includes your claim.

VILLAGE: CORPORATION

Nelson Lagoon: Nelson Lagoon Corporation

The official filing date of the map of boundaries is:

June 18, 1987

Federal regulations state that any conflicts among potential transferees or between the village corporation and such transferees are to be resolved before the map is submitted to BLM. 43 CFR 2650.5-4 (c) (1).

The Bureau of Land Management does not have any authority to adjudicate transfer decisions. Any disputes over 14(c) transfers must be resolved between the village corporation and the individual.

If you disagree with the village corporation's boundary decisions, you should contact the corporation. If the disagreement is not resolved, you must start a court action *within one year of the date shown above.* If you have a dispute and do not start a court action within one year, you will forfeit your claim. Alaska National Interest Lands Conservation Act (ANILCA), Sec. 902(b).

Thursday, June 18, 1987, The Anchorage Times

Exhibit "B"